In The

Supreme Court of the United States

October Term, 1979

No. 79-886

THE UPJOHN COMPANY and
GERARD THOMAS,

Petitioners,

v.

UNITED STATES OF AMERICA
and DAVID E. NOWAK, Special Agent,
Internal Revenue Service,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Brief Amici Curiae on Behalf of the American College of Trial Lawyers and 33 Law Firms In Support of the Petition

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This brief is filed with the consent of all parties, and in support of the petition for certiorari, on behalf of the American College of Trial Lawyers and the law firms whose names are subscribed at the end of the brief.

QUESTIONS PRESENTED

1. Whether the attorney-client privilege should be limited so as to protect the confidentiality of communications between an attorney representing a corporation and employees of the corporation only when such employees are among that group within the corporation who are responsible for deciding and directing corporate action in response to the legal advice sought.

2. Whether the work-product doctrine, developed in *Hickman v. Taylor*, 329 U.S. 495, and its progeny, provides a qualified immunity against disclosure of materials sought by a summons issued by the Internal Revenue Service pursuant to 26 U.S.C. § 7602.

INTERESTS OF THE AMICI CURIAE

The American College of Trial Lawyers is an organization of more than 3,000 lawyers and judges throughout the United States dedicated to the improvement and enhancement of the standards of trial practice, the administration of justice and the ethics of the trial branch of the legal profession. The 33 law firms whose names are subscribed to this brief are regularly engaged in the representation of corporations and appear as amici curiae with the College because the issues presented by this case fundamentally affect responsibilities they have to their clients, the administration of justice and the legal profession.

Petitioners and respondents here must necessarily focus on the particular facts of this case and the respective interests of the parties to this litigation. The problems raised by the decision of the court below, however, are much broader in nature than the circumstances giving rise to this particular case, for they put in issue the very nature of the attorney-client privilege in the corporate area and

the applicability of the work-product doctrine to investigative proceedings involving individuals as well as corporations. This brief will focus on the urgent need for the enunciation by this Court of a clear and workable definition of the corporate attorney-client privilege, accurately reflecting the way modern corporations function, and of standards for application of the work-product doctrine which are consistent with the responsibilities and role of counsel in an adversary system of justice.

STATEMENT

The facts and proceedings below are fully set forth in the petition, which seeks review of a decision of the United States Court of Appeals for the Sixth Circuit holding that the attorney-client privilege protects the confidentiality of communications between an attorney representing a corporation and employees of the corporation only when such employees constitute the "senior management" or "control group" of the corporation, and further that the work-product doctrine, developed by this Court in *Hickman v. Taylor,* 329 U.S. 495, provides no immunity against the disclosure of information sought by an administrative summons issued by the Internal Revenue Service pursuant to 26 U.S.C. § 7602.

The opinion of the court below is reported at 600 F.2d 1223, and at p. 1-a of the Appendix to the petition. (Pet. App., 1-a).

REASONS FOR GRANTING THE WRIT

A. The Decision of the Court Below, Which is in Conflict with Decisions of Other Courts of Appeals, Presents Issues of Vital Importance to Corporations and Their Counsel Which Require Consideration and Decision by This Court.

Corporations have played a central and pervasive role in the economy of the United States for more than a century, and as the corporate form of organization has continued to expand in scale, number and significance, so has the involvement of the government in corporate activities. Compliance with constantly changing tax, securities and antitrust laws, as well as many other federal and state regulations, presents numerous legal questions, often of great complexity, which require the active participation of counsel in the affairs of the modern corporation. The decision of the court below, departing as it does from the policies underlying protection of the attorney-client relationship, raises serious and fundamental questions concerning the extent to which the professional advisory function of lawyers can be performed in the corporate area.

The test adopted by the court below for application of the attorney-client privilege to corporations will reduce the effectiveness of the professional advice corporations will receive and substantially impede voluntary compliance by corporations with laws dependent to a very great extent for their enforcement on responsible corporate reaction to competent legal advice. The confusion which now exists among the circuits concerning the scope of the corporate attorney-client privilege and the availability of the work-product doctrine in investigative proceedings compounds the problem, for corporations today are not confined in their activities to any particular circuit or jurisdiction, and counsel cannot properly advise any busi-

ness conducted on a national scale when the rules which govern their conduct read one way in New York, Philadelphia, and Detroit, and another way in Chicago and St. Louis.

Seldom is this Court presented with such an appropriate vehicle as this case for review of two important and related issues which many lower court decisions demonstrate are recurring in nature and on which there is a direct conflict among the circuits. As this Court recognized when it granted certiorari in *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided Court,* 400 U.S. 348, such conflict and uncertainty with respect to issues so central to the administration of justice warrant the attention of this Court.

1. The Decision of the Sixth Circuit and a Recent Decision of the Third Circuit Limiting the Scope of the Corporate Attorney-Client Privilege to the "Control Group" of the Corporation are in Direct Conflict with Decisions of the Courts of Appeals for the Seventh and Eighth Circuits.

Although it has been established for several years that the attorney-client privilege applies to corporate as well as individual communications with counsel,[1] there are now diverse and conflicting views among the federal courts on

[1]See, *e.g., Radiant Burners, Inc. v. American Gas Ass'n.,* 320 F.2d 312 (7th Cir. 1963), *cert. denied,* 375 U.S. 929; *Paper Converting Machine Co. v. FMC Corp.,* 215 F.Supp. 249, 251 (E.D. Wis. 1963);*United States v. Becton Dickinson & Co.,* 212 F.Supp. 92, 93 (D. N.J. 1962); *United States v. Aluminum Company of America,* 193 F.Supp. 251, 253 (N.D. N.Y. 1960); *United States v. American Radiator & Standard Sanitary Corp.,* 1958 CCH Trade Cas. ¶ 68,954 (W.D. Pa. 1958); *Zenith Radio Corp. v. RCA,* 121 F.Supp. 792 (D. Del. 1954); *United States v. United Shoe Machinery Corp.,* 89 F.Supp. 357 (D. Mass. 1950); *Danisch v. Guardian Life Ins. Co.,* 18 F.R.D. 77 (S.D. N.Y. 1955); *Lalance Mfg. Co. v. Haberman Mfg. Co.,* 87 F. 563 (C.C.S.D. N.Y. 1898).

the scope of the corporate privilege. The test adopted by the court below for application of the privilege to corporations was first enunciated in *City of Philadelphia v. Westinghouse,* 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied, sub nom., General Electric Co. v. Kirkpatrick,* 312 F.2d 742 (3d Cir. 1962), *cert. denied,* 372 U.S. 943, where the privilege was limited to protect only communications between counsel and members of the so-called "control group" of the corporation. Subsequently, the control group test was applied by the Tenth Circuit in *Hogan v. Zletz,* 43 F.R.D. 308 (N.D. Okla. 1967), *aff'd sub nom. Natta v. Hogan,* 392 F.2d 686 (10th Cir. 1968).[2]

In *Harper & Row Publishers, Inc. v. Decker, supra,* the Court of Appeals for the Seventh Circuit concluded that the control group test was undesirably restrictive and adopted a broader and more balanced test, characterized as the "subject matter" test, to determine the scope of the corporate attorney-client privilege. This Court recognized the significance of the conflict then existing among the circuits on the scope of the privilege, and attempted to resolve it by granting certiorari in *Harper & Row;* however, the *Harper & Row* decision was affirmed without opinion by an equally divided Court. 400 U.S. 348.

The important distinction between the two conflicting tests for application of the privilege is the extent to which communications between the corporate attorney and lower level corporate employees are protected by the attorney-client privilege. The control group test limits the privilege to communications between corporate counsel and a limited group of corporate executives who have ultimate corporate responsibility for acting upon the advice of counsel. *City of Philadelphia v. Westinghouse, supra,* 210 F.Supp.

[2] It remains unclear whether the Tenth Circuit has in fact adopted the control group test. In *Natta v. Hogan, supra,* the test was applied without any discussion, 392 F.2d 692. The opinion of the District Court indicates that application of the control group test was uncontested. 43 F.R.D. 312-14.

at 485. The subject matter test, on the other hand, provides protection to communications between the corporate attorney and corporate employees under circumstances where the communication is made at the direction of the employee's superior and where the subject matter of the attorney's advice, and that of the communication, is the performance by the employee of the duties of his employment. See 2 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 503(b) [04] at 503-46 to 503-48 (1979).

Recently the question of the scope of the corporate attorney-client privilege has been the subject of further consideration and decision, which has resulted in an intensification of the conflict in the courts of appeals. In *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978), the Eighth Circuit made application of the subject matter test. The Third Circuit has reaffirmed its preference for the control group test, *In re Grand Jury Investigation (Sun Company, Inc.)*, 599 F.2d 1224 (3d Cir. 1979), and the Sixth Circuit has now decided to "align ourselves with the courts that have adopted the 'control group' analysis." 600 F.2d at 1227. Thus, the circuits which have considered and decided the issue are now equally divided, with most of the decisions having come down since *Harper & Row*. The need for this Court to resolve this conflict is greater today than it was when certiorari was granted in *Harper & Row*.[3]

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[3] Review by this Court is required not only to resolve the conflict among the decisions of the courts of appeals, but also to provide an authoritative delineation of the scope of the corporte attorney-client privilege in order to avoid the continuing confusion on this important question throughout the federal judicial system. See *In re Grand Jury Subpoena*, 599 F.2d 504 (2d Cir. 1979); *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377 (D.D.C. 1978); *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 459, (N.D. Cal. 1978); *Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136 (D. Del. 1977); *Duplan Corp v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1165 (D.S.C. 1974); *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 35-39 (D. Md. 1974).

2. The Decision of the Court Below That the Qualified Work Product Immunity is Inapplicable to an Internal Revenue Service Summons is in Conflict with a Decision of the Court of Appeals for the Seventh Circuit.

This is one of the rare cases presenting two related issues on which the courts of appeals are divided. The second question presented here is whether the qualified work-product immunity, first articulated in *Hickman v. Taylor*, 329 U.S. 495, may be invoked to prevent disclosure of information sought by an Internal Revenue Service summons issued pursuant to 26 U.S.C. § 7602, an issue previously considered by the Fifth Circuit in *United States v. McKay*, 372 F.2d 174 (5th Cir. 1967), and by the Seventh Circuit in *United States v. Brown*, 478 F.2d 1038 (7th Cir. 1973).

In *Brown*, the Seventh Circuit held that the work-product doctrine was applicable to a summons enforcement proceeding. The Fifth Circuit was not required to decide the issue in *McKay*, but stated that it was "doubtful" that the doctrine was applicable in that context.[4] Notwithstanding this division of opinion on the issue, the court below in this case disposed of the issue in a footnote, holding, contrary to the Seventh Circuit in *Brown*, that "the work-product doctrine of *Hickman v. Taylor* and Fed. R. Civ. P. 26(b)(3) is not applicable to administrative summonses issued under 26 U.S.C. § 7602."

In *Reisman v. Caplan*, 375 U.S. 440, 449, this Court recognized the right of a party to challenge an Internal Revenue Service summons "on any appropriate ground," and Mr. Justice White, in his concurring opinion in *United States v. Nobles*, 422 U.S. 225, 247 n.6, noted the diver-

[4]The United States District Court for the Northern District of Texas has recently construed *McKay* to permit application of the work-product doctrine to an IRS summons. *United States v. Lipshy*, ... F.Supp. ..., 79-2 U.S.T.C. ¶ 9628 (N.D. Tex. Sept. 25, 1979).

gence among the courts of appeals on whether the work-product immunity should apply to material requested by such a summons. As in the case of the attorney-client privilege, this confusion on the applicability of the work-product doctrine to an administrative summons has now developed into a direct conflict between the Sixth and Seventh Circuits which can only be resolved by this Court.

B. The Decision of the Court Below is Inconsistent with Principles Established and Applied by Several Decisions of This and Other Federal Courts Concerning the Attorney-Client Privilege and the Work-Product Doctrine.

1. The Attorney-Client Privilege

Since the purpose of the attorney-client privilege is to enable the client to obtain legal advice based on the fullest possible understanding of the facts, *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336; *Hunt v. Blackburn*, 128 U.S. 464, 470, the scope of the privilege must be such that it will "encourage clients to make full disclosure to their attorneys." *Fisher v. United States*, 425 U.S. 391, 403. The test adopted by the court below for application of the attorney-client privilege to corporations is inconsistent with the basic policies recognized by this Court as underlying the privilege and fails to take account of the ways in which modern corporations are organized and operate, and how they seek, assimilate and act upon legal advice.

The Sixth Circuit's opinion is based upon the fundamental misconception that there is a definable "control group" in every corporation which is responsible for corporate action based upon legal advice. Indeed, "it is only the senior management," the court below said, "which can be said to possess an identity analogous to the corporation as a whole." 600 F.2d 1226. This view of the way corpo-

rations function gives undue emphasis to the legal fiction of the corporate entity and is contrary to the teaching and experience of authoritative corporate analysts, who view corporate decision-making as a process rather than an event.[5] As a practical matter, principal corporate executives are ordinarily not involved in the day-to-day operations of the corporation which may be the subject of legal inquiry and advice.[6] Corporations today are more often characterized by decentralized decision making, where responsibility for corporate action may be delegated not only to divisions and departments, but also to lower level employees, such as contract administrators, and purchasing and sales personnel, who act for and bind the corporation in its relations with other parties.[7] Even when the ultimate

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[5] "Decisions often appear to be unique and isolated events. However, a decision reflects antecedent behavior as well as anticipated consequences. Therefore, it is necessary to understand decision making as a process. Focusing only on the moment of choice among alternatives . . . leads to a false concept of decisions and 'ignores the whole lengthy, complex process of alerting, exploring and analyzing that precedes the final moment'." D. E. McFarland, *Management: Principles and Practices,* McMillan Pub. Co. (1974) at 262, quoting H. A. Simon, *The New Science of Management Decision,* Harper & Row (1960) at 1.

[6] See, *e.g., Modern Management, Issues and Ideas,* D. R. Hampton (ed.), Dickenson Pub. Co. (1975); E. Uyterhoeven, *General Managers In The Middle,* 50 Harv. Bus. Rev. 75 (1972); *Top Management Handbook,* H. B. Maynard, (ed), McGraw-Hill (1960); V. Vroom, *A New Look At Managerial Decision Making,* Organizational Dynamics-AMACOM (Spring 1973).

[7] See *e.g.,* H. Stieglitz and A. Janger, *Top Management Organization in Divisionalized Companies,* Conference Board, Studies in Personnel Policy No. 195 (1965). The control group test produces the incongruous result that subordinate corporate employees for whose conduct a corporation is liable, and whose knowledge is imputed to it, cannot speak confidentially to the corporation's attorneys about the acts which they perform on the corporation's behalf.

decision is made by a corporate executive, preliminary legal consultation and analysis is frequently and necessarily delegated to subordinate personnel.

If the objectives of the attorney-client privilege are to be accomplished in the corporate area, counsel must be able, as the subject matter test permits, to elicit information from and to advise those corporate employees most directly involved in the area or problem giving rise to the need for investigation and advice. Counsel should not be confronted with the dilemma inherent in the control group test of either advising the client without knowledge of all relevant facts, or of obtaining the necessary information from the client's agents and employees at the risk of having to divulge it to an adverse party. The Eighth Circuit identified this critical deficiency in the control group test in its decision in *Diversified Industries, Inc. v. Meredith, supra,* 572 F.2d at 608-09:

> In a corporation, it may be necessary to glean information relevant to a legal problem from middle management and non-management personnel as well as from top executives. The attorney dealing with a complex legal problem "is thus faced with a 'Hobson's choice.' If he interviews employees not having 'the very highest authority,' their communications to him will not be privileged. If, on the other hand, he interviews *only* those with 'the very highest authority,' he may find it extremely difficult, if not impossible, to determine what happened." [citation] Thus, the control group test inhibits the free flow of information to a legal advisor and defeats the purpose of the attorney-client privilege.

Since first-hand knowledge of relevant facts is usually possessed by corporate agents and employees who do not have the ultimate responsibility of officers or directors of the corporation, the practical effect of the control group test is substantially to deprive corporations of the protection of the attorney-client privilege. It will also inhibit

the efforts of corporate counsel to seek out and develop information concerning existing and past activities of corporations in order to insure compliance at all levels of the corporate structure with the myriad of laws and regulations which govern corporate conduct today. This important relationship between the scope of the privilege and compliance by corporations with laws dependent for their enforcement on the responsibility and advice of corporate counsel was described in *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1165-65 (D.S.C. 1974), as follows:

> [T]he only way that a lawyer can really understand how a corporation operates, what it is doing, and what it can do within the confines of the antitrust laws, is to go out into the branch offices and into the field to make the rounds with the salesmen. After the lawyer forms his or her opinion, it is of no immediate benefit to the chairman of the board or the president. It must be given to the corporate personnel who will apply it. If an attorney cannot make enquiries of salesmen and if the attorney cannot give advice to the corporate personnel who will apply it, then a corporation would be reluctant to seek legal advice since its confidential communications would not be protected by the attorney-client privilege. This court recognizes that it is not the federal government that is primarily responsible for enforcement of the federal antitrust laws but rather the lawyers who advise their corporate clients.

The suggestion in the opinion below that the control group test is necessary to avoid the possibility of counsel being the "exclusive repository of unpleasant facts" and corporate managers "shielding themselves from information about possibly illegal transactions," 600 F.2d at 1227, is unwarranted and ignores the reality that the subject matter test protects only communications with counsel and does not prevent discovery of the underlying facts known by corporate agents and employees. *Grant v. United States*,

227 U.S. 74, 79; *Giordani v. Hoffman,* 278 F.Supp. 886, 888-90 (E.D. Pa. 1968). Hence, there is little possibility of obstruction from the activities of counsel advising a corporate client under the subject matter test, which imposes several preconditions to any claim of privilege. See *Diversified Industries, Inc. v. Meredith, supra* at 609.

Finally, the rationale of the privilege, that it induces disclosures "which might not have been made absent the privilege," *Fisher v. United States, supra,* 425 U.S. at 403, presumes knowledge at the time the communication is made that it will be accorded protection. Under the control group test, however, neither counsel nor the client will be able to ascertain with certainty at the time a communication is made whether it can be protected. Indeed, the test is so uncertain as to make prospective determination of its application impossible and, therefore, only serves to undermine the policies this and other federal courts have recognized as the basis for the attorney-client privilege.

2. The Work-Product Doctrine

This Court's opinion in *Hickman v. Taylor, supra,* the first clear articulation of the work-product doctrine, was a natural refinement of the newly established discovery procedures, a development "grounded in the realities of litigation in our adversary system." *United States v. Nobles,* 422 U.S. 225, 238. The real question underlying the second issue presented by this case is whether, because an administrative summons is involved, there is no necessity for adherence to policies deemed by this Court to be essential to "the orderly prosecution and defense of legal claims." *Hickman v. Taylor, supra,* 329 U.S. at 510.

Applicability of the work-product doctrine to an administrative summons, such as that issued here by the Internal Revenue Service pursuant to 26 U.S.C. § 7602, presents many of the same issues considered by the lower federal courts in determining the availability of the doc-

trine in grand jury investigations. Some early doubt concerning the propriety of applying the doctrine at the investigative stage of criminal proceedings, *Schwimmer v. United States,* 232 F.2d 855 (8th Cir. 1956), *cert denied,* 352 U.S. 833, was resolved in favor of its applicability through resort to the basic policy underlying the doctrine. See *In re Grand Jury Proceedings (Duffy),* 473 F.2d 840, 847 (8th Cir. 1973):

> While it is true that the cases [cited] above involved criminal trials rather than Grand Jury proceedings, we see no reason to distinguish them on that basis. Surely the search for truth is no less compelling at a criminal trial than at a Grand Jury proceeding. The interest in protecting work product which prevails in the former criminal proceeding should, for the same policy reasons, prevail in the latter.

As the government acknowledged in its brief below, an IRS summons is analogous to a grand jury investigation, and there is now almost universal acceptance by the lower federal courts of the applicability of the work-product doctrine to grand jury investigations. *In re Grand Jury Investigation (Sun Company, Inc.), supra; In re Grand Jury Subpoena, supra; Velsicol Chemical Corp. v. Parsons,* 561 F.2d 671 (7th Cir. 1977), *cert. denied,* 435 U.S. 942; *In re Grand Jury Proceedings (Duffy), supra; In re Grand Jury Investigation (Sturgis),* 412 F.Supp. 943 (E.D. Pa. 1976); *Matter of Rosenbaum,* 401 F.Supp. 807 (S.D. N.Y. 1975); *United States v. Mitchell,* 372 F.Supp. 1239 (S.D. N.Y.), *app. dismissed,* 485 F.2d 1290 (2d Cir. 1973); *In re Terkeltoub,* 256 F.Supp. 683 (S.D. N.Y. 1966).

A summons issued by a Special Agent of the IRS Criminal Investigation Division could lead to further civil or even criminal proceedings. See *United States v. LaSalle Nat'l Bank,* 437 U.S. 298. There is, therefore, no basis for drawing a distinction between an administrative and grand jury investigation. Nor is there any sound reason why the IRS should not be required to utilize traditional means

available for obtaining discovery rather than compelling attorneys for individual and corporate taxpayers to testify concerning communications with their clients, or to open their files for examination by the IRS. As this Court said in *Hickman v. Taylor, supra,* 329 at 510-11:

> In performing his various duties * * * it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

In *United States v. Nobles, supra,* 422 U.S. at 238, this Court saw no reason to limit application of the work-product doctrine to civil proceedings, saying "its role in assuring the proper functioning of the criminal justice system is even more vital." Review of the decision below is necessary because an administrative summons, issued by the Internal Revenue Service pursuant to 26 U.S.C. § 7602, must be governed by the same policies if the right to the meaningful assistance of counsel is to be preserved in administrative investigations as well as judicial proceedings.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

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